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be the subject of a valid assignment as well as may any other chose in action. The beneficiary under a policy of life insurance takes a vested right that cannot be divested without his consent, but the extent of that right is limited by the instrument creating it, viz., the policy itself. C. E. E.

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EXPERT TESTIMONY IN MICHIGAN.—Perhaps no other feature of our judicial system has contributed more to bring into disrepute the administration of justice and to engender in the popular mind a widespread (and in some respects an apparently justifiable) distrust and disrespect for the methods employed and the results obtained by judicial investigations in this country, than have the principles and considerations, or rather the lack of these, which are permitted to govern and determine the competency of expert witnesses and the methods and safeguards under which they are allowed to give in evidence in our courts their expert opinions in cases involving questions pertaining to their respective sciences. The general public regards expert testimony, as it is permitted to be given in the majority of our courts at the present day, as almost a farce, and considers it a disgrace to our system of arriving at the truth of a disputed question, which system we like to think of as being fair, enlightened, impartial and efficient. This feeling has in the past taken definite form in the oft-expressed belief of the layman that the expert always comes prepared to testify in favor of the side which has the most money, without regard to what the facts may be, and that in a case in which experts are called to testify upon each side of a disputed proposition, the issue will be determined favorably to the side which can pay the most and whose experts can swear the hardest. It can scarcely be questioned that these beliefs and sentiments are entertained by a considerable number of the general public and have served to bring this phase of judicial inquiry into disrepute.

With a view to remedying some of the evils arising from the present methods of giving expert testimony in courts of law, statutes have, from time to time, been enacted in the several states, which attempt generally to render less intimate the relation which was popularly supposed to subsist, and in many cases did subsist, between the compensation paid the expert and the nature and effect of his testimony. A statute of this general class was that passed by the Legislature of the State of Michigan in 1905, entitled, "An Act to regulate the employment of expert witnesses," (Pub. Acts 1905, No. 175.) The nature of its provisions seemed eminently calculated to remedy some of the evils toward which the statute was manifestly directed, § 3 of the Act providing that, "In Criminal cases for homicide where the issues involve expert knowledge the court shall appoint one or more *disinterested persons*, not more than three, to investigate such issues and testify at the trial; and the compensation of such person or persons shall be fixed by the court and paid by the county in which the indictment was found, and the fact that such witnesses have been so appointed shall be made known to the jury. This provision shall not exclude either prosecution or defense from using other expert witnesses at the trial." The usefulness of this act, and

particularly of this section, has been brought to an abrupt and lamentable termination, and the evils which it sought to remedy are given an opportunity to continue without let or hindrance, by a recent decision of the Supreme Court of Michigan, rendered by BROOKE, J., in the case of *People v. Dickerson* (1910), — Mich. —, 129 N. W. 199, in which the third section, above quoted, was declared unconstitutional and void.

The case of *People v. Dickerson*, supra, was a prosecution for homicide in which the defendant interposed the plea of insanity, whereupon the court, pursuant to § 3 of the above act, proceeded to appoint two disinterested persons to investigate, who were permitted, over the objection of the defendant's counsel, to testify as to defendant's sanity. From a conviction the defendant appealed, on the ground that § 3 of the statute, under which the experts were appointed by the trial court, was unconstitutional and void. In declaring the section unconstitutional, the court indulges in reasoning which is far from being altogether satisfactory and convincing.

The first ground of objection against the validity of the section of the statute under discussion is based on the premise that it deprives the defendant of his life and liberty without "due process of law," which from time immemorial has contemplated that in criminal prosecutions the parties are the state or people, represented by the prosecuting attorney, on the one hand, and the accused on the other; and that the statute violates the spirit of this immemorial usage and revolutionizes the nature of criminal prosecutions by injecting therein a new and incongruous element, charged with selecting and calling witnesses, which, says the court, it has always been the exclusive right and duty of the prosecuting attorney to determine upon and call to give testimony for the people. Against this argument at least three objections may be raised. In the first place the court apparently loses sight of the fact, that a criminal prosecution, in principle at least, is not to the same extent as a civil action, a purely adversary proceeding, but is rather a proceeding in the nature of an inquest or investigation, conducted on behalf of both the state and the accused for a common end, namely, to inquire into the circumstances surrounding the alleged commission of an offence, with a view of determining whether a crime has in fact been committed and, if so, who is responsible therefor, or to quote from the opinion of CHRISTIANCY, C. J., in *Hurd v. People*, 25 Mich. 405, "It is an investigation to show the whole matter as it is, whether the tendency be to convict or acquit." It is manifest that in such a proceeding the judge, a public officer charged with the preservation of the peace and security of the community, is equally responsible with the prosecuting officer in developing the truth, and therefore this statute, which confers upon him duties eminently conducive to that end, is not so incompatible with the theory of a criminal prosecution as to render it open to the objection of revolutionizing criminal proceedings. In a civil suit the situation is quite different. The parties there are working at cross purposes, each attempting to establish opposing propositions instead of working in theory for a common end, as is the case in a criminal prosecution. In such a case the court must necessarily be more or less of an umpire between disputing interests, and to confer upon him powers in aid of one would necessarily

prejudice the other and change the whole position and function of the judge. But it was not with a civil case that the statute was dealing or toward which the argument of the court was directed. Secondly, the argument of the court that the prosecuting attorney, and he alone, has the right to determine who shall be called and sworn as witnesses for the people is certainly inconsistent in principle with the repeated decisions of this same court, that the prosecution must call and swear as witnesses all persons present at the commission of a crime. *People v. Germaine*, 101 Mich. 485; *Hurd v. People*, 25 Mich. 405; *Wellar v. People*, 30 Mich. 16; *People v. McCullough*, 81 Mich. 25; *People v. Harris*, 95 Mich. 87; *Thomas v. People*, 39 Mich. 309; *People v. Deitz*, 86 Mich., 419; *People v. Gordon*, 40 Mich. 716; *People v. Swetland*, 77 Mich. 53. That the trial court may compel the prosecutor to call a witness to testify for the people, see *People v. Kenyon*, 93 Mich. 19. Clearly, if the prosecutor may be compelled to call certain witnesses, it does not rest entirely within his option to call whom he pleases, and any argument against this statute based on this premise must necessarily fail. Thirdly, it may be urged against this argument that the court assumes that the witnesses appointed under the statute are necessarily witnesses for the people. The statute does not provide that they be sworn as such, and it would very probably work out in actual practice that their testimony would be found to be in favor of the accused in quite as many instances as against him. Hence they do not fall necessarily within that class of witnesses over which the court declares that the prosecution from time immemorial has had exclusive jurisdiction.

As a second ground of unconstitutionality of this statute, the court declares that it operates to cast a purely administrative and executive function upon a judicial officer, contrary to the spirit of our institutions, which demands that a sharp distinction be preserved between the various departments of government. In reply to this argument it may be said that much confusion of thought exists, and considerable lack of unanimity is to be found, in the adjudicated cases involving this question. In the practical administration of the government, moreover, it is safe to say that the officers of each department daily exercise powers and functions which in their essential nature pertain to officers of the other departments. A few instances of statutes conferring powers on judicial officers inherently of a more administrative and executive nature than those conferred upon the court by the Michigan statute and which were judicially declared not unconstitutional on that ground may be cited: Appointment of commissioners to make assessments of damages, *City of Terre Haute v. Evansville & T. H. Ry. Co.*, 149 Ind. 174; Appointing board of commissioners for a charitable institution, *Wilkison v. Board of Children's Guardians*, 158 Ind. 1; Presiding over disputed election returns, *Johnson v. Jackson*, 99 Ga. 389; Appointment of guards to protect property from mobs, *Cahill v. Perrine*, 105 Ky. 531; Duty of collecting inheritance tax, *Union Trust Co. v. Duffee*, 125 Mich. 487; Powers relating to issuance of liquor licenses, *State v. Bates*, 96 Minn. 110; Appointment of park commissioners, *Ross v. Board of Chosen Freeholders*, 69 N. J. L. 291; Duty to evaluate the amount of inherited property and assess inheritance tax, *Nunne-macher v. State*, 129 Wis. 190. Besides, is the duty conferred by the third

section of the Michigan statute under discussion administrative or executive at all? Clearly, if any function is judicial in its nature, it is that of determining the competency of witnesses who are to give testimony in a judicial proceeding. That the statute contemplates that the court shall exercise this function is evident, for its very terms are, "the court shall proceed to appoint one or more *disinterested persons*," thereby requiring the court to pass upon their competency, so far as interest or bias is concerned, before appointing them. Is this a duty different in nature and principle from that exercised by the court with regard to any witness? If the duty imposed upon the court by this statute be not judicial, it would seem difficult to imagine one more so.

The court next proceeds to attack the statute upon the ground that the names of these witnesses cannot be indorsed upon the information, as required by Mich. C. L. (1897), § 11934 thereby depriving the defendant of a substantial right. It is clear that the statute does not forbid their indorsement, nor is there any reason why the court may not upon the filing of the information proceed to appoint the witnesses pursuant to the statute and indorse, or cause to be indorsed, their names thereon, in cases where the facts set forth in the information involve expert knowledge, and in cases where the facts calling for expert opinion are brought out as matter of defence, the court might appoint the experts and indorse their names on the information when the issues are raised. That is as much as can be done at the present time, where the defendant raises a defence involving expert testimony, as for example the defence of insanity, for in the nature of the case the state cannot anticipate the defence until it is raised. Moreover the Supreme Court of Michigan has held in several cases, that the names of material witnesses may be indorsed on the information even after trial begun, when the names of such witnesses were then learned for the first time, or, upon reasonable showing by the prosecutor that they were not known to him when the information was filed, their names may be indorsed subsequent to filing the information. *People v. Howes*, 81 Mich. 396; *People v. Perriman*, 72 Mich. 184; *People v. Machen*, 101 Mich. 400; *People v. Baker*, 112 Mich. 211; *People v. Luders*, 126 Mich. 440; *People v. Gregory*, 130 Mich. 522. It would seem in view of these cases that this objection to the statute finds little support in reason or authority and that no substantial objection exists to construing together this section of the statute under discussion and the statute requiring the names of the witnesses for the prosecution to be indorsed on the information when filed, with a view to sustaining and reconciling the provisions of both.

Lastly the court declares that this section of the statute, (§ 3), is invalid in that it tends to give undue weight in the eyes of the jurors to the witnesses appointed under it, and that the court, by informing the jury that he had appointed these witnesses and that they were disinterested, would indicate to the jury the opinion of the court as to the merits of the case, which the jury would seize and act upon to the prejudice of the defendant. But why should not a witness who has been found by the court to be free from the prejudicing influences and interests to which experts are usually subjected, be given greater weight than other witnesses? Is not the very purpose of

judicial inquiry to ascertain truth by the testimony of disinterested witnesses, and if any means can be devised by which disinterested witnesses can be obtained, ought it be denied validity and legality merely because the jurors would be inclined to accord to such witnesses the weight to which they, by reason of their disinterested character, are justly entitled? It can hardly be urged that the present situation of the jurors with regard to experts and expert testimony is to be preferred; a situation in which, after hearing expert witnesses of apparently equal credibility come to diametrically opposite conclusions upon the basis of the same state of facts, the jurors without any means of determining which of the witnesses are entitled to greater weight, naturally come to the conclusion that the side upon which the most experts testify must represent the truth of the issue. It would seem that any device for remedying, even in part, a procedure so fatal to the intelligent investigation and ascertainment of truth ought to be welcomed and sustained, rather than to be declared invalid. Moreover is the fact, that the court informs the jury that he has found the persons appointed to be disinterested, objectionable as indicating to the jury the opinion of the judge as to the issues? We submit that it is not. Manifestly for a judge to say to a jury, "This man is a disinterested witness," is far different from his saying, "this man is disinterested and knowing his testimony I think it is true." In the first situation, being the one contemplated by the statute, the court merely passes upon the witness's competency without expressing any opinion on his testimony, a thing which the court could not do in the nature of the case, for at that time the witness in question has not yet testified; while in the second situation the court expresses an opinion both as to the character of the witness and the truth and reasonableness of his testimony, a proceeding which could not arise under the statute in question. It would seem that the objection of the court based on the argument just discussed is without much foundation in reason.

In conclusion it may be said that it is to be regretted that the court in *People v. Dickerson*, supra, felt constrained to declare unconstitutional a statute of so useful and beneficial a character as the one involved in that case and to do so upon grounds, which upon examination would seem to be so unsubstantial and inconclusive, both upon reason and authority. It is to be hoped that the evils sought to be remedied by this statute will not long be suffered by the legislature to continue uncurbed, and that when any further legislation looking to their abolition comes before the court for construction, the court will not be impelled to go to so great lengths in declaring it invalid.

McK. R.

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<sup>1</sup> FEDERAL SUPREME COURT'S JURISDICTION UNALTERABLE.—In the recent decision of *Muskrat et al. v. United States*, 31 Sup. Ct. 250, the Federal Supreme Court shows its intention not to depart from the early established rule expounded in *Marbury v. Madison*, 1 Cranch 137. Congress by act of Mar. 1, 1907 (37 Stat. at L. 1015, Chap. 2285), attempted to confer jurisdiction upon the court of claims and by appeal upon the Federal Supreme Court, of certain suits by David Muskrat and others in behalf of certain of the Chero-